

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000352

04/23/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

SAMUEL K LESLEY

v.

DOUGLAS P KALOS

JOSEPH SAIENNI

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #8969173;
#8969174

Charge: DUI;
DUI BAC .10 OR MORE WITHIN TWO HOURS OF DRIVING

DOB: 01/15/65

DOC: 09/29/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of oral argument on March 28, 2003. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the memoranda and arguments submitted by counsel.

The first issue presented in this appeal is whether the trial judge erred in denying Appellant's Motion in Limine to Suppress the Breath Test Results based upon the State's alleged
Docket Code 512 Form L000 Page 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000352

04/23/2003

inability to prove that the Intoxilyzer was operating correctly. The evidence in this case consisted of the testimony of expert witnesses and was presented in a logical, coherent fashion by well-prepared counsel. Appropriately, the trial judge (the Honorable Matias Tafoya) complimented counsel on their presentation.¹

Interestingly enough, the electronic records of Appellant's breath test indicated that, at the time of his test, the Intoxilyzer was working accurately as there were no problems with reference checks or with the test itself.² Appellant's breath test occurred September 29, 2000. Subsequent to Appellant's breath test, the Intoxilyzer machine registered unstable reference errors. When the machine detects an unstable reference, it invalidates the test itself.³ The State's expert, Michael Campbell, testified that unstable references happen frequently, and, in his opinion, they would not have affected Appellant's test.⁴ Campbell further testified that he believed the Intoxilyzer was working properly at the time of Appellant's breath test.⁵

This court's review of the trial judge's ruling on Appellant's Motion in Limine is limited to determining whether the trial judge abused its discretion.⁶ That is, this court should reverse a trial judge's ruling on the admissibility of evidence only when it finds that the trial judge abused his or her discretion.⁷

In this case the trial judge concluded that the State had proven a *prima facie* case that the Intoxilyzer machine was operating properly pursuant to A.R.S. Section 28-1323(A). The trial judge ordered:

In this case my ruling will be that the State has made a *prima facie* case. As a matter of law, the evidence will come in under the statutory foundation [A.R.S. Section 28-1323(A)].

Now, the matter of presentation of the case is going to be up to the State. And obviously when the defense presents their case, you're going to have all that evidence that comes- - that you put in before me, and it's going to be up to the skill of the attorney to sell the bad smell to the jury. And because it is a question of weight, not admissibility. And that's where the skills of the lawyer will come into play in the trial, how the case is presented to the jury.⁸

¹ R.T. of June 18, 2002, at page 86.

² Id. at page 29.

³ Id. at page 62.

⁴ Id. at page 63

⁵ Id.

⁶ *State v. Sharp*, 193 Ariz. 414, 973 P.2d 171 (1999).

⁷ *State v. Emery*, 141 Ariz. 549, 688 P.2d 175 (1984).

⁸ R.T. of June 18, 2002, at pages 87-88.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000352

04/23/2003

The trial judge's conclusions that the State had satisfied A.R.S. Section 28-1323(A) by proving a *prima facie* case that the Intoxilyzer machine was operating correctly is supported by the record. Substantial evidence exists to impeach this conclusion, and the trial judge appropriately and correctly found that this impeaching evidence would be admissible at trial by the defense to challenge the State's evidence that the Intoxilyzer was operating correctly. This court finds no error by the trial judge.

The second issue raised by Appellant concerns the sufficiency of the evidence to warrant the trial judge's verdict of guilty as to Count II. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.⁹ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.¹⁰ If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.¹¹ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.¹² When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.¹³ The Arizona Supreme Court has explained in *State v. Tison*¹⁴ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹⁵

This Court finds that the trial court's determination as to Count II was not clearly erroneous and was supported by substantial evidence.

⁹ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

¹⁰ *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

¹¹ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

¹² *In re: Estate of Shumway*, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

¹³ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

¹⁴ SUPRA.

¹⁵ Id. At 553, 633 P.2d at 362.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000352

04/23/2003

IT IS ORDERED affirming the judgments of guilt and sentences imposed.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT